Superior Court of California,
County of Mendocino

Tentative Rulings

for

Ukiah Department G
Friday 9:30am Law & Motion Calendar

Calendar Date: June 24, 2016

Prior to a Civil Law & Motion or Probate hearing, the Court may issue a tentative ruling pursuant to California Rule of Court 3.1308. Unless a party requests to appear and notifies both the opposing party and the court, no hearing will be held, and the tentative ruling will become the order of the Court.

A party wishing to appear to provide oral argument must advise the opposing party and the Court by phone or by e-mail no later than 4:00pm on the court day before the hearing.

Phone: (707) 468-2007, Option 2
E-mail: tr@mendocino.courts.ca.gov

If you do not notify the opposing party and the Court by 4:00pm on the court day before the hearing, no hearing will be held.

If you do not find information regarding your particular case, and you have not previously been informed that you are excused from the calendar, an appearance is required.

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Administrative History

The salient facts underlying this litigation are fairly straightforward.[1] In February 2015 Cross-Development (real party in interest) applied to Mendocino County ("County") for the issuance of a building permit for the construction of a retail store building (project) in a C-2 zone. County's Department of Planning and Building Services ("Department") determined that the project complied with MCC[2] 20.004.045, in that the project was an allowed use in a C-2 zone and otherwise complied with the zoning ordinance, and issued the building permit on June 6. Petitioners subsequently filed an administrative appeal pursuant to MCC 20.208.101 June 16. The appeal was heard and denied by County's Planning Commission on July 16. The Chehadas appealed that denial to County's Board of Supervisors ("Board") . Following a public hearing that commenced October 6, the Board adopted Resolution 15-171 on November 3, 2016 sustained the denial by the Planning Commission of Chehadas' appeal, specifically determined that the project use was an allowed use in a C-2 zone and that the project otherwise complied with the zoning ordinances, that the zoning clearance was a ministerial act statutorily exempt from CEQA[3]review and that the project was not inconsistent with County's Plan. On November 6, 2016 the County filed a Notice of Exemption ("NOE") pursuant to PRC 21152 (b) on the indicated ground that the issuance of the building permit constituted a ministerial action within the scope of PRC 21080 (b) (1) and Guideline 15268.

Procedural Background

Petitioners filed their initial petition on January 8, 2016 and a first amended petition on February 8, challenging the County's approval of the issued building permit, seeking to compel the County to conduct a further environmental review and to make general plan findings (writ of mandate), contending the County did not proceed in the manner required by law in its approval

[1] **The administrative history is based on the allegations in the Petition, the exhibits attached to the petition and the facts of which the court has taken judicial notice.**

[2] **Mendocino County Code.**

[3] **California "Environmental Quality Act, Public Resources Code (PRC) 21000 et seq.** .

of the permit (administrative writ of mandate), and for declaratory relief. The court sustained the demurrers granting leave to amend.

Petitioners filed their second amended petition ("SAC") pleading the same general causes of action as alleged in the first amended petition but adding a fourth cause of action alleging the denial of procedural and substantive due process. Petitioners again implicitly acknowledge they failed to bring this action within 35 days of the November 6, 2015 filing of the NOE. They again allege the County is estopped from raising as an affirmative defense petitioners' failure to commence this action within 35 days of the filing of the NOE. (PRC 21167 (d)). Petitioners additionally allege the County failed to provide them with a copy of the NOE, once posted, in compliance with PRC 21092.2.

Cross Development has filed a general demurrer to the SAP on the primary ground that that the action is barred by the PRC 1167 (d) statute of limitations and that petitioners have not alleged sufficient facts to constitute estoppel. Respondent also contends petitioners have failed to state a cause of action for denial of due process. Cross Development also contends the inclusion in the SAP of a separate cause of action for denial of due process exceeded the scope of the leave to amend granted in the court's order sustaining the demurrer to the SAP.

Petitioners subsequently noticed a motion for July 22 for a specific order permitting them to raise the due process claim by amendment. The court will defer until a ruling on that motion, any consideration of petitioners' due process claim as presently set forth in the fourth cause of action to the SAP.

Discussion

In the consideration of a demurrer, the court is guided by a number of principles. While the court must accept as true all facts pled in the petition (the court may disregard the effect of contentions, deductions or conclusion of fact or law. (*Blank v Kerwin (1985) 39 C3rd 311, 318*). If factual allegations made in the pleading are contradicted by facts contained in exhibits attached to the pleading, the court must give preference to the facts stated in the exhibits. *(Kong v City of Hawaiian Gardens Redev. Agency (2003) 108 4th 1028, 1033 n2)*

1. *Traditional Writ of Mandate (CCP 1085):* A writ of mandate may not be issued unless the respondent is obligated to perform in a legally described manner when a given set of facts exists. (*Flores v Cal. Dept. of Corrections & Rehabilitation (2014) 224 CA4th 199, 204*) There must exist a clear and present duty on the part of the respondent that is required by law. *(Santa Clara Counsel Ass'n. v Woodside (1994) 7 4th 525, 539)* Petitioners contend respondent County failed to comply with the provisions of CEQA in its determination that the issuance of the building permit constituted a "ministerial" decision that was otherwise exempt from further CEQA review under PRC 21080(b)(1). Specifically, the SAP contends CEQA required the County to conduct further environmental review even if the project were consistent with the zoning ordinances.4 The SAP, thus, alleges an asserted obligation either to perform a specific act or to exercise discretion whether or not to perform that act.

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A. *Count One: CEQA:*

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(1) Statute of Limitations: The obligations alleged by petitioners unquestionably arise under the provisions of CEQA which imposes varying but strict timelines for commencing judicial challenges to environmental decisions. Petitioners contend the County failed to comply with CEQA in its determination that the zoning clearance determination and the issuance of the building permit constituted "ministerial acts" that were not subject to environmental review under

wPRC 21080(b)(1) A judicial action challenging a public agency determination that a project is not subject to CEQA review, such as the County made in this situation, must be commenced within 35 days of the filing of the NOE, if such a notice is filed, or, otherwise, within 180 days from the commencement of the project. (PRC 21176(d))

The facts relating to the filing of the NOE and the commencement of petitioners' judicial challenge are not in dispute. On November 9, 2015, three days after the Board had denied

[4] SAP 12: 3-10.

petitioners' appeal from the Planning Commission and specifically determined that the project was consistent with zoning ordinances and that the zoning-clearance determination was a ministerial act exempt for further CEQA review under PRC 21080 (b)(1), the County filed an NOE with its county clerk pursuant to PRC 21152 (b).5 Petitioners commenced this action on January 8, 2016, *some fifty days* after the posting of the NOE. Petitioners' CEQA- based writ petition is clearly barred by PRC 21167(d) which clearly and unambiguously provides that any action challenging a public agency determination that a project is exempt from further CEQA review under PRC 21080 "shall be commenced within *35 days* from the date of the filing by the public agency" of the NOE.

Estoppel / CEQA / Limitations

Petitioners implicitly concede their action is facially barred by the statute of limitations but contend the County should be estopped by representations made by its employees and by their subsequent conduct from raising the defense that petitioners failed to comply with PRC 21167(d).

(a) *Elements*: The principles of estoppel have been discussed repeatedly from the very commencement of our judicial history with variations only in minor detail and without substantial change. (*Johnson v Johnson (1960) 179 CA2nd 326, 330)* The principle is fairly straightforward:

> "It is elementary that equitable estoppel lies only where someone by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and *induces* him to act on that belief so as to alter his own previous position (Citation omitted). Or as the court put it in *Seymour v. Oelrichs* (1909) 156 Cal. 782, 795 [106 P. 88]: '"The vital principle is that he who by his language or conduct leads another to do *what he would not otherwise have done* shall not subject such person to loss or injury by disappointing the expectations upon which he acted ..."' (italics added.)"
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> *Calif. Sch. Emp. Assn. v Jefferson Elementary Sch. Dist. (1975) 45 3rd 683, 692-93; original emphasis)*

[5] SAP, Ex. G and H.

California courts have traditionally required the party seeking to invoke the principle of estoppel to plead and prove five elements: (1) the representation or concealment of a material fact; (2) made with the knowledge, active or virtual, of the facts; (3) to a party ignorant of the truth; (4) with the intention that the latter act upon it; and (5) the party must have been induced to act upon it. (*Wood v Blaney (1895) 107 C 291,295; San Diego Mun. Credit Union v Smith (1986) 176 CA3rd 919, 922-223)* Other courts have sought to further define the traditional elements and allocate them between the parties involved in a asserted estoppel.

> " An estoppel by conduct or misrepresentation, also called an "estoppel in pais," is an equitable doctrine uniformly recognized as requiring proof of certain elements. The rule, with many cases cited in support, has thus been stated (28 Am.Jur.2d 640-641, Estoppel and Waiver § 35): "Broadly speaking, the essential elements of an equitable estoppel or estoppel in pais, *as related to the party to be estopped*, are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. And broadly speaking speaking, *as related to the party claiming the estoppel*, the essential elements are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2)reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice." (Italics added.)

Gamboa v. Atchison, Topeka & Santa Fe Ry. Co. (1971) 20 Cal.App.3d 61, 65

The court in *Gamboa* (id. 65) also observed that the concept of estoppel involves an element of *fault* or *blame* on the party against whom the defense is raised.

> "It is elementary that equitable estoppel lies only where someone by his words or conduct *wilfully* causes another to believe the existence of a certain state of things and *induces* him to act on that belief so as to alter his own previous decision."
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> *City of Long Beach v Mansell (1970) 3 C3rd 462, 488 (original emphasis)*

The defense of estoppel must be strictly construed and should not be enforced every element is satisfied. (Bear Creek Co. v James 115 CA 2ND 725, 732)

> "Statutes of limitation are favored by the law (citation omitted) and the law does not favor estoppels, especially where the party attempting to raise the estoppel is represented by counsel."

Kuntsman v Mirizzi (1965) 234 2ND 753, 757 (emphasis supplied)

Prior to an assessment of the alleged facts against the elements of estoppel, it is necessary to determine what specific facts have been alleged in support of the estoppel defense. Petitioners assert they relied upon a combination of specific statements made by planning director Steve Dunnicliff and/or Board of
Supervisors member Carrie Brown and of subsequent conduct by Mr. Dunnicliff and others.

(b) *Representations and conduct::* The primary verbal representations cited by petitioners were all made by Mr. Dunnicliff or Supervisor Brown in a series of emails which were attached as exhibits to the SAP. 6 (1) In response to a written email inquiry (6/5/15) from petitioners' counsel Brian Momsen "whether the applicant has filed and posted a Notice of Exemption and if so when?", Mr. Dunnicliff f responded on the same day: "To answer your specific question, a Notice of Exemption has not been filed or posted for this project." (2) In response to an inquiring email (6/5/15) from Cass Taaning, allegedly on behalf of petitioners, Mr. Dunnicliff responded the same day: "Planning & Building Services has not yet issued this permit." (3) In response to an email (6/5/15) from Mr. Momsen to Board of Supervisors member Carrie Brown inquiring "whether the applicant has filed and posted a Notice of Exemption and if so when?", Supervisor Brown replied: "You have raised a legal timeline that I don't know about precisely, staff will have to answer."

Petitioners allege the Department issued the building permit after having made the MCC 20.180.020 (a) zoning compliance determination a few days earlier. The County did not file an NOE in connection with these actions. County's Board of Supervisors on November 3 denied petitioners' appeal of the zoning clearance determination and issuance of the building permit and filed the NOE on or prior to November 9.7

(c) Analysis of Elements

(i). *False Representations/Concealments of Material Facts:*

[6] **SAP, Exhibits A through D.**
[7] See, generally, FAP pg. 5, 10 and 11.

The allegations made and/or exhibits incorporated in the SAC clearly prove that the cited representations made by Mr. Dunnicliff and Supervisor Brown were true, accurate and complete when made. The NOE had not yet been filed on the date of Mr. Dunnicliff's responses to Mr. Momsen and Ms. Tanning and, in fact, was not filed until November 9, 20158. Supervisor Brown made no relevant representations to Mr. Momsen but referred him the "staff." There are no factual allegations made or facts stated in the SAP exhibits establishing that, in making the referenced statements, County or its employees had knowledge of but conceal any material facts from petitioners.

Petitioners argue they were "misled" by a combination of the cited communications and a subsequent course of conduct into believing the County would not file an NOE at any time in connection with the zoning clearance determination and/or building permit.9 Petitioners suggest the passage of five months after the exchange of emails created the (incorrect) impression that the County would not file an NOE. The facts stated in the exhibits to the SAP provide a clear explanation for the five month period and belie any reasonable argument that the County lulled petitioners into inactivity.

During virtually the entirety of the five month period between the permit issuance and the filing of the NOD, the permit was suspended either by an appeal period or by actually pending appeals. Petitioners correctly allege the existence of ten-day appeal periods following both the initial zoning clearance determination/permit issuance and the denial by the Planning Commission of their appeal. Petitioners further allege they filed timely appeals from both the permit issuance and the Planning Commission action. Thus, during the entire period from June 8 to November 3, when the Board of Supervisors denied petitioners' appeal, the building permit was subject to or under appeal. The building permit did not become final until the petitioners exhausted their administrative remedies and the Board of Supervisors denied their appeal with the adoption of Resolution 15-171 on November 3, 2015. 10 Additionally, the filing of an NOE is entirely optional with a public agency. It is under no statutory or regulatory obligation whatsoever to file an NOE or, if it so elects, at any particular time. (*PRC 21152 (b))*

[8] **SAP, Ex. H.**
[9] SAP pg. 5, 10 and 11.
[10] **SAC, Ex. G**

Deferring the filing of the NOE until after the issuance of the building permit became final can hardly be characterized as a course of conduct resulting in misrepresentation or concealment of material facts.

The factual allegations in the FAP, when examined in conjunction with the facts stated in the exhibits to the FAP, are not sufficient to establish that the County falsely represented to or concealed material facts from petitioners regarding the County's intention to file an NOE.

(ii). *Intention to Mislead:* Petitioners must establish by factual allegations that the County intended petitioners to rely on its conduct to thereby influence them. The FAP contains no *factual* allegations whatsoever supporting the contention that the County *intended* or *expected* petitioners to rely on the five month filing-deferral to lull petitioners into believing the County would not file an NOE at any time. While petitioners may argue the court should *infer* this intent from the five month period, this inference is unreasonable in light of the progression of appeals/denials that occurred during that five month period as detailed above.

The factual allegations in the FAP, when examined in conjunction with the facts stated in the exhibits to the FAP, are not sufficient to establish that the County intended or expected the five month filing-deferal to cause petitioners to believe that the County did not intend to file an NOE or to lull them into failing to regularly check with the County for the actual filing of an NOE.

Petitioners have failed to plead factual allegations sufficient to establish at least two of the elements required to support the defense of estoppel. The sufficieny of the allegations underlying the defense of estoppel may be tested by a demurrer. (*Gamboa v Atchison, Topeka, Etc., (supra) 20 CA3rd 68)* The defense of estoppel should be strictly applied cannot be established unless all of the elements have been substantiated by factual allegations. (*Johnson v Johnson, supra, 179 2ND 330)*

(**2) PRC 21152 Posting:** Petitioners' allegation[11] that County failed to post the NOE for the requisite 30 days is flatly contradicted by the fact stated in Exhibit H to the SAP: "Posted from 11/9/15 to 12/9/15." If factual allegations made in the pleading are contradicted by facts contained in exhibits attached to the pleading, the court must give preference to the facts stated in the exhibits. *(Kong v City of Hawaiian Gardens Redev. Agency (2003) 108 4th 1028, 1033 n2)*

***(*3) PRC 211092.1/21152:** Petitioners allege the County failed to comply with PRC 21109.1 requiring mailed notice of the NOE filing to any person who submitted a written request therefor. Petitioners failed to allege compliance with PRC 21109.1 by alleging (1) the submission of a *written* request (2) addressed to "the clerk of the governing body." Petitioners allege only "intended" oral notice to the Department director.

B. Count Two: General Plan: Petitioners have failed to identify a specific statutory duty imposed on the County as a result of a given set of underlying facts. Petitioners allege that the County made an MCC 20.004.045 zoning consistency determination and issued a building permit; however, they have failed to specify any statutory or regulatory requirement that would require a general plan consistency finding in connection with either action. Furthermore, Resolution 15-171, attached as Exhibit G to the SAP, established that the County made a general plan consistency finding. If factual allegations made in the pleading are contradicted by facts contained in exhibits attached to the pleading, the court must give preference to the facts stated in the exhibits. (*Kong v City of Hawaiian Gardens Redev. Agency (2003) 108 4th 1028, 1033 n2)*

C. Count Three: Due Process: Petitioners have failed to identify a specific statutory duty imposed on the County as a result of a given set of underlying facts. Furthermore, this claim is basically the same as is set forth in the fourth cause of action.

The demurrer to the first cause of action in the SAP will be sustained without leave to amend unless petitioners can demonstrate at the 6/24 hearing there is a *reasonable probability* the petition can be successfully amended. (*BFGC Etc. v Forum/Mackey Constr., Inc. (2004 119*

[11] SAP 11:7-10.

4TH 848, 854) Petitioners must allege *facts* that would establish a cause of action. (*Major Clients Agency v Diemer (1998) 67 Ca4th 1116, 1133)*

SCUKCVG 01-85184 Becker v Haendle

1. Haendle Motions: The request of plaintiff Becker for the issuance of an Order to Show Cause re Contempt (OSC) hearing at a date to be determined by the court will be granted.

2. Becker Motions: In response to the request of Haendles for the issuance of an OSC re Contempt, Becker filed a pleading partially titled: "Request for: Dismissal of Entire Action Without Prejudice; Retraction of Legal Easements; Voiding all Court Orders and Rulings; Ordering Change of Venue and Recusal of Judge Richard J. Henderson for Defendants Fraud upon the Court." This pleading requests the court to grant affirmative relief not directly related to the Haendle motion for an OSC. The relief requested by Becker must be requested in the form of separate motions with statutory notice pursuant to CCP 1004(b).

All of the "requests" raised in the combined objection/request pleading filed June 10 will be denied. Becker's request to disqualify judge Henderson does not comply with the statutory requirements.